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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 549

JENNINGS-WATTS OIL COMPANY, INCORPORATED,
Petitioner,

vs.

CORNELIUS GILBERT, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF GILBERT STORAGE AND TRANSFER COMPANY, ET AL.

(In the Case of Cornelius Gilbert, Doing Business, etc., Plaintiff, versus Gulf Oil Corporation, Defendant)

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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1. *Respondent has submitted no authority or reason which supports his contention that petitioner's motion to intervenely was not timely.*—Throughout his brief respendent overlooks the fact that the action in which petitioner seeks to intervene was instituted by Gilbert against Gulf Oil Corporation in the Western District of Virginia during January, 1948 (R. 1).

In none of the District Court decisions relied upon by respondent on the question of timeliness did the motions to intervene meet the other requirements of Section 24 (a) for intervention of right.

In *Union National Bank of Youngstown* v. *Superior Steel Corp.*, 9 F. R. D. 124, the indemnitor of defendant moved to intervene to oppose the motion of plaintiff to dismiss its own complaint. The dismissal could not prejudice or bind the indemnitor, and no reason existed why the intervention should be allowed.

In *In Re Rumsey Mfg. Corp.*, 9 F. R. D. 93, the United States attempted to intervene in a District Court proceeding to act as an *observer* and *not* as a *combatant* whereas its rights were sufficiently protected in the pending bankruptcy proceeding in which it had presented its claim.

Lockwood v. *Hercules Powder Company*, 7 F. R. D. 24, involved only permissive intervention under Rule 24 (b), not intervention of right under Rule 24 (a).

In *Mullins* v. *De Soto Securities Co.*, 2 F. R. D. 502, no grounds existed for an intervention of right. Moreover, the application to intervene was not made until plaintiff's case had been dismissed in a written opinion, and while a motion for rehearing was pending.

Respondent has utterly failed to show that any prejudice or inconvenience to him would, or could, have resulted if the District Court had granted the motion to intervene at the time it was made, which was two months before the date set for trial. The motion to intervene was timely. Cf. *De Korwin* v. *First National Bank of Chicago*, 94 F. Supp. 577, 578.

2. *Respondent has failed to rebut petitioner's showing that the representation of its interest by its indemnitee "is or may be inadequate."*.—Petitioner's interest in respondent's action against Gulf arises from paragraph Tenth of

the contract of November 1, 1939, between petitioner and Gulf Oil Corporation (R. 27). That paragraph of the contract indemnifies Gulf against *any and all claims* arising from petitioner's operation and covers claims based on negligence, or otherwise, so the obligation of petitioner as indemnitor is *absolute*. Cf. *Russell* v. *Shell Oil Co.*, 339 Ill. App. 168, 89 N. E. 2nd 415, 417. The indemnity agreement clearly makes petitioner an indemnitor to save Gulf harmless from such claims as that on which Gilbert is suing Gulf. The sole purpose of intervention by petitioner in the action by Gilbert against Gulf Oil Corporation is to be able to participate in the defense of that action so as to preclude Gilbert from making a recovery against Gulf, the burden of which would inevitably be passed on to petitioner under its absolute obligation created by the indemnity agreement. In such a situation the "practical necessities" grant petitioner an absolute right to intervene, because there is no other proceeding in which petitioner may protect its interest. *Brotherhood of Railroad Trainmen* v. *Baltimore & O. R. Co.*, 331 U. S. 519, 524.[1]

Whether the agreement of November 1, 1939 (R. 24) between petitioner and Gulf gives petitioner the status of independent contractor, or that of an agent or employee of Gulf, is totally immaterial. In either event petitioner has bound itself absolutely under paragraph Tenth of said agreement (R. 27) to indemnify Gulf against any and all

[1] While execution could not issue directly against petitioner's property on a judgment in favor of Gilbert against Gulf, it would be quite a simple matter for Gulf to institute a separate legal proceeding against petitioner—a step which Gulf has in fact already initiated—in order to secure the aid of court process in enforcing petitioner's absolute obligation to indemnify Gulf against the judgment. In such a proceeding Gulf could put in evidence the indemnity contract and the judgment against it, and petitioner would have no defense, *unless* it could prove fraud, collusion or negligence of Gulf in the trial of the action in which the judgment was obtained against Gulf. *United States* v. *C. M. Lane Lifeboat Co.*, 25 F. Supp. 410, 411.

claims arising from petitioner's operations. Hence, the case of *Gulf Refining Company* v. *Brown*, 93 F. (2d) 870, relied upon by respondent, has no bearing on the application of Rule 24 (a), because in that case the court merely held that Gulf was liable as principal to a third party injured by operations of a distributor of Gulf products, and did *not* pretend to hold that an agent or employee may *not* voluntarily bind itself under an indemnity agreement with its principal.

The brief of respondent relies primarily upon an assumed financial worth of petitioner which is not shown in the record. The right to intervene provided by Rule 24 (a) is not expressly or impliedly conditioned upon, or measured by, the financial standing of an intervener or of any party to the litigation. In this case intervention is necessary adequately to protect *whatever* present assets petitioner may own and to safeguard its possibilities of future development. Justice and fairness demand that petitioner should *not* be *forced to* entrust its representation to the same counsel who are suing petitioner on the indemnity agreement. It is questionable whether the same counsel could ethically accept this type of dual employment if it were voluntarily offered to them.

Another assumption of respondent is fundamentally unsound. It seems too obvious for argument that the successful advocacy by one set of Gulf attorneys of the *forum non conveniens* doctrine (*Gulf Oil Corporation* v. *Gilbert*, 330 U. S. 501) furnishes no proof or assurance that an entirely different set of Gulf attorneys (R. 13) will adequately represent the interest of petitioner in a trial, before a local jury in Virginia, of the factual issues involved in the pending litigation initiated by Gilbert against Gulf in 1948. In the latter litigation the attorneys representing Gulf necessarily occupy an inconsistent position with respect to peti-

tioner since they are attorneys for Gulf in a pending action against petitioner on its indemnity agreement (R. 24).

The word "may", as used in the clause "is or may be inadequate" appearing in Rule 24 (a) (2), should be construed in its ordinary sense to mean "might possibly". *United States* v. *Lexington Mill & Elevator Co.*, 232 U. S. 399, 411; *State ex rel, English* v. *Ruback*, 281 N. W. 607, 610. Certainly, the representation of petitioner's interest, in an action brought against its indemnitee (Gulf) by Gilbert in which any judgment rendered against Gulf will be binding on petitioner, "might possibly" be inadequate where the same counsel for the indemnitee in that action also represent the indemnitee in its pending action against petitioner to enforce the indemnity agreement. To say the least, there is a "reasonable possibility" that the representation of petitioner's interest by counsel for Gulf may be inadequate. *Federal Trade Commission*v. *Morton Salt Co.*, 334 U. S. 37, 46.

3. *Allowance of intervention will not divest the Federal Court of jurisdiction.*—An argument made by respondent in the lower courts, to the effect that intervention by petitioner would destroy the diversity of citizenship necessary for Federal jurisdiction of the action (R. 34-35), is not urged in respondent's brief. Of course, there can be no doubt that the intervention will be ancillary or auxiliary to Gilbert's action against Gulf and that its allowance will not take away the jurisdictional ground of diverse citizenship, although petitioner and Gilbert are citizens of Virginia, since the presence of petitioner is not essential to a decision of the controversy between the original parties. *Wichita R. & Light Co.* v. *Public Utilities Commission*, 260 U. S. 48, 53-54.[2]

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[2] To the same general effect see *City of Orangeburg* v. *Southern Ry. Co.*, 134 F. (2d) 890, 894; *Division 525, Order of Ry. Conductors of America*

Conclusion

It is respectfully submitted that the petition for writ of certiorari should be granted.

ROYSTON JESTER, III,
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March 12, 1951.

Certificate of Service

I, the undersigned, one of the attorneys of record for Jennings-Watts Oil Company, Incorporated, do hereby certify that I have this day served the within reply brief upon Max. J. Gwertzman, attorney for respondent, by delivering a printed copy of the within brief to said attorney by mailing a copy thereof to him by United States mail, postage prepaid, at 116 John Street, New York City, New York.

This 12th day of March, 1951.

MAC ASBILL,
Attorney for Jennings-Watts Oil Company, Incorporated,
Petitioner.

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v. *Gorman*, 133 F. (2d) 273, 277; *Boesenberg* v. *Chicago Title & Trust Co.*, 128 F. (2d) 245, 247; *Williams* v. *Keyes*, 125 F. (2d) 208, 209; *Kentucky Natural Gas Corporation* v. *Duggins*, 165 F. (2d) 1011, 1015; *Drumright* v. *Texas Sugarland Co.*, 16 F. (2d) 657; *Sun Oil Co.* v. *Humble Oil & Refining Co.*, 88 F. Supp. 658. See also 4 Moore, *Federal Practice* (2d ed. 1950), § 24.18, p. 135.